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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

NO. 430

STATE OF FLORIDA EX REL
VIRGIL D. HAWKINS, et al.,
PETITIONERS,

vs.

BOARD OF CONTROL, et al.,
RESPONDENTS.

ON PETITIONS FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

BRIEF OF RESPONDENTS IN OPPOSITION

OPINIONS BELOW

There have been three opinions of the Supreme Court of Florida, as follows:

First Opinion

The first opinion, dated August 1, 1950, involving petitioner Virgil D. Hawkins (R. 25) is reported in 47 So. 2d 608; the opinion involving Rose Boyd (R. 25) is reported in 47 So. 2d 619; the opinion involving petitioner Oliver Maxey (R. 24) is reported in 47 So. 2d 618; the opinion involving petitioner Benjamin Finley (R. 25) is reported in 47 So. 2d 620.

Second Opinion

The second opinion of the Supreme Court of Florida was entered on July 15, 1951. The opinion in the Hawkins Case (R. 40) is reported in 53 So. 2d 116; in the Boyd Case (R. 28) reported in 53 So. 2d 120; in the Maxey Case (R. 27) reported in 53 So. 2d 119, and in the Finley Case (R. 28) in 53 So. 2d 119.

Third Opinion

The third opinion of the Supreme Court of Florida was entered on August 1, 1952. The opinion in the Hawkins Case (R. 47) is reported in 67 So. 2d 162; in the Boyd Case (R. 32) reported in 67 So. 2d 166; in the Maxey Case (R. 31) reported in 67 So. 2d 166, and in the Finley Case (R. 31) reported in 67 So. 2d 166.

Jurisdiction

On petitioners' refusal to proceed further in the Florida court and their demands for final judgment, the Supreme Court of Florida, on August 1, 1952, with its third opinion, denied in each case the petitioner's third motion for peremptory writ of mandamus, quashed the alternative writ of mandamus theretofore issued, and dismissed the case. (Hawkins R. 47; Boyd R. 32; Maxey R. 31; Finley R. 31.)

Jurisdiction of this court is attempted to be invoked under Title 28, Section 1257 (3), United States Code. The petitioners predicate their claims for relief upon the equal protection clause of the Fourteenth Amendment to the Constitution of the United States.

Question Presented

Can the State of Florida refuse to admit petitioners to the University of Florida for the

pursuit of graduate training in agriculture and chemical engineering, and professional training in law and pharmacy solely because of their race and color without violating petitioners' rights to the equal protection of the laws as guaranteed under the Fourteenth Amendment to the Constitution of the United States?

Statement of the Case

There were originally five petitioners—: Virgil Hawkins, Rose Boyd, Oliver Maxey, Benjamin Finley, and William T. Lewis. The last named appears to have withdrawn, and these proceedings are brought severally by Hawkins, Boyd, Maxey and Finley. They are companion cases presenting the same issue. For that reason, the petitioners file only one petition, and respondents only one brief in opposition.

On April 4, 1949, the petitioners applied for admission to the University of Florida, which is an institution of higher learning maintained and operated by the State at Gainesville, Florida. State statutes provide that only students of the white race may be admitted. Petitioner Hawkins applied for admission to the school of law; petitioner Boyd to the school of pharmacy; petitioner Maxey applied for courses in graduate level chemical engineering, and petitioner Finley applied for courses in graduate level agriculture.

Petitioners' applications were referred to the respondent, Board of Control, which is the agency of the State having complete control and management of the State's institutions of higher learning, subject at all times to the supervision of the State Board of Education of Florida. At a hearing on May 13, 1949, the petitioners, all of whom are members of the negro race,

were informed that under the laws of the State of Florida they could not be admitted to the University of Florida; that the schools and courses for which petitioners had applied had prior thereto been authorized and ordered to be set up at the Florida Agricultural and Mechanical College for Negroes, a State supported and maintained institution of higher learning located at Tallahassee, Florida, but said courses had not then actually been installed, and for this reason petitioners were offered out-of-state scholarships equal to any courses offered at any tax supported institution within the State of Florida (Hawkins R. 16-17; Finley R. 16-17; Boyd R. 16-17; Maxey R. 15-16).

The petitioners refused to accept the scholarships offered, and filed in the Supreme Court of Florida their petitions for alternative writs of mandamus, (R. 1) and the petitions were granted (R. 4). Thereupon, the respondents filed motions to quash (R. 8) and these motions were denied by order of December 8, 1949 (R. 8).

The summer school for which applicants applied had expired a long time before respondents' answer was due, and there was no further application by the petitioners for any subsequent term or session at the University of Florida until 1952.

On January 7, 1950, respondents filed their answers. (The record shows two separate answers. The first answer, appearing in the record on Page 9, was the answer of three members of the Board of Control whose terms expired in June, 1949, and those answers make no reply to anything which transpired subsequent to the end of their terms. Otherwise, the two answers are identical. The more complete answer was that of

the Board of Control, as a corporate body, and the members of the Board whose terms continued, as well as the other respondents. This later answer, to which reference will be made, appears in the record—Hawkins, R. 15; Boyd R. 15; Finley R. 15; Maxey R. 14).

In their answers the respondents referred to the laws of the State of Florida which prohibit the admission of any other than white students at the University of Florida; that in the absence of actually functioning schools or courses requested by the applicants, out of state scholarships, fully equal to any schools or courses offered at any tax supported institution within the State had been offered to the applicants; that prior to petitioners' applications there had been authorized and ordered set up the schools and courses requested by the applicants at the Florida Agricultural and Mechanical College for Negroes at Tallahassee, another institution of higher learning of the State of Florida under the management of the respondents.

The answers further showed that in the meantime the Board of Control, as newly constituted, by resolution of December 21, 1949, had established at Florida Agricultural and Mechanical College for Negroes, for applicants and others similarly situated, who might make timely application, the courses and schools requested by applicants. (Hawkins R. 21; Boyd R. 20; Finley R. 20; Maxey R. 20.) They further showed that by its resolution of December 21, 1949, applicants, upon making timely applications, would be admitted to their requested courses in said Florida Agricultural and Mechanical College for Negroes; and, further, that in the event that necessary and equal facilities, equipment and personnel for any of said courses were not immediately available at the last named institution at the

time application might be made, provision had been made for applicants' instruction in said courses at the University of Florida until such time as adequate and comparable facilities and personnel for courses of study substantially equal to those at the University of Florida should be functioning at said Florida Agricultural and Mechanical College for Negroes (R. 20) (The Resolution is set out in full, Hawkins, R. 22; Boyd, R. 22; Finley R. 22; Maxey R. 21.)

On January 19, 1950, petitioners filed their motion for peremptory writ of mandamus, notwithstanding respondents' answer (Hawkins, R. 24; Boyd, R. 24; Finley, R. 24; Maxey, R. 23).

In its opinion of August 1, 1950, the Supreme Court of Florida held that the petitioners' motions for peremptory writ was the equivalent of a demurrer and operated as an admission of facts well pleaded by respondents; that the respondents' answer raised two questions: (1) whether out of state scholarships offered applicants accorded the petitioners equal protection of the law under the Fourteenth Amendment to the Constitution, and (2), if not, did the program set up by the Board of Control, (Resolution of December 21, 1949, Hawkins R. 22; Boyd R. 22; Finley R. 22; Maxey R. 21) satisfy the rights of the petitioners.

The Florida court, following this court's decisions, held that the out of state scholarships were not sufficient compliance with the Fourteenth Amendment. It further held, however, that the plan provided by the Board of Control accorded petitioners full rights under that amendment, and that it fully satisfied the State's obligation to furnish petitioners with equal educational oppor-

tunities (Hawkins R. at pages 32-38; Boyd R. at 26; Finley R. at 26; Maxey R. at 25)

Notwithstanding its conclusion, the Florida court retained jurisdiction of the cases until it be shown by either party that the Board of Control had, or had not, failed to furnish petitioners, after due application, such opportunities and facilities for pursuing their desired courses of study as are substantially equal to those afforded to the students enrolled in like courses at the University of Florida.

Following that opinion, which was dated August 1, 1950, the petitioners permitted the case to remain dormant until May 16, 1951, when they filed another motion for peremptory writ of mandamus (Hawkins R. 39; Boyd R. 27; Finley R. 27; Maxey R. 25). On June 15, 1951, the Florida court found that petitioners had made no proof or showing of re-application, or as to whether or not there had been established at the Florida Agricultural and Mechanical College for Negroes the courses desired, as required by the court's original opinion. The court denied the petition for peremptory writ, but again retained jurisdiction in order that either party might make proof that equal opportunities and facilities had, or had not, been provided for the petitioners (Hawkins R. 40; Boyd R. 28; Finley R. 28; Maxey R. 27).

Petition for writ of certiorari was filed in this court, but it was denied (November 13, 1951) because the Florida court's judgment of June 15, 1951, was not a final judgment, ... U. S. ....., 96 L. ed. 65.

Again, the cases remained dormant until on May 28,

1952, when petitioners filed another motion for peremptory writ in which they declined to proceed further, standing upon the pleadings as filed and demanding final judgment (Hawkins R. 45; Boyd R. 31; Finley R. 30; Maxey R. 29). The Florida court again found that petitioners had failed to submit any proof as to the equality or inequality of the opportunities provided for them at the Florida Agricultural and Mechanical College for Negroes, or that facilities there provided did not afford to them the guarantees to which they were entitled under the Constitution. The court further found that schools and courses demanded by the petitioners were functioning and in operation at the Florida Agricultural and Mechanical College for Negroes, and that the courses were similar in content and quality to those offered at the University of Florida; that it has all of the required facilities, faculty, students and equipment. The court further found that petitioners had persistently refused to apply for admission to the Florida Agricultural and Mechanical College for Negroes. On petitioners' demand for final judgment the court denied the motions for peremptory writ, quashed the alternative writs theretofore issued, and dismissed the causes. (Hawkins R. 47; Boyd R. 32; Finley R. 31; Maxey R. 31.)

Argument

In their petition, under the heading "Opinions Below," the petitioners greet the court with the statement that these cases have now been pending for more than two years. They close their "Statement of the Case" with the averment that two years after the initial decision the court below, on August 1, 1952, entered its final judgment dismissing the cases. The pointed manner in which the statements are made seem to imply

that the petitioners have had to wait a long time for a final judgment. Surely it was not intended to mislead this court into believing that there is similarity to the case of Sipuel vs. Oklahoma Board of Regents, 332 U. S. 631, 92 L. ed. 247, 68 S. Ct. 299, in which the circumstances persuaded this court to summarily order the admission of the applicant because of what the court there considered inexcusable delay of the Oklahoma authorities. The fact of the matter is, as shown by the record, that the petitioners could have had final judgment immediately after the first opinion of the court on August 1, 1950, had they asked for it. Or they could have had a hearing on the equality of facilities immediately after the opinion of August 1, 1950; the Supreme Court of Florida retained jurisdiction of the case for that purpose. The record shows that notwithstanding the retention of jurisdiction by the Supreme Court of Florida to hear proof on the question of equality or lack of equality of educational facilities provided for them, petitioners at no time offered any proof whatever or made any move in that direction, and that at no time asked for final judgment until just prior to the third opinion, which was entered on August 1, 1952. The record shows that whatever delay there may have been in reaching a final judgment or to obtain any other appropriate relief was due to the failure of the petitioners to move or ask for it.

Petitioners contend that the "separate but equal" decisions of this court are error.

This court has repeatedly answered the petitioners' question and re-affirmed the validity of that principle. The answer to petitioners question is that the State may refuse to admit petitioners to the University of Florida because of their race or color without violating

the Constitution of the United States by providing for them separate but equal facilities in a comparable tax supported institution within the State as promptly as it provides them for white students in institutions established for the latter.

Petitioners state in their argument that "whether the courses which petitioners seek are now being offered on a segregated basis is, we submit, beside the point. Any distinctions based upon race or color at the professional and graduate school level of state universities violate the equal protection clause of the Fourteenth Amendment." They cite in support of that statement Sweatt v. Painter, 339 U. S. 629, 94 L. ed. 1114; McLaurin v. Oklahoma State Regents, 339 U. S. 637, 94 L. ed 1149; Wilson v. Board of Supervisors, 340 U. S. 909, 95 L. ed 657; McKissick v. Carmichael, 187 F. 2d 949 (C. A. 4th 1951); cert. den. 341 U. S. 951, 95 L. ed 1374.

Those cases did not abolish the "separate but equal" principle. In fact, the court found in those cases that the schools provided for the negro students were not equal to those provided for white students. In so determining, the court actually followed that doctrine. In each of those cases there was proof and evidence submitted as to the white and negro schools. The petitioners here very carefully avoided any proof or evidence as to the courses at the University of Florida on the one hand, and the courses at the Florida Agricultural and Mechanical College for Negroes on the other, presumably to submit the question of segregation in schools unencumbered by any question of fact as to whether or not the separate facilities were equal. The length of time during which a law school or any other course has been in existence at any institution does not determine the ques-

tion. It may be one factor in appraising a school, but it is not at all controlling.

Petitioners refer to the proposed admission to the University of Florida under certain conditions on a segregated basis. The Board of Control's resolution provides that upon the failure to supply equal facilities at the Florida Agricultural and Mechanical College for Negroes the students shall be admitted to the University of Florida and the institution "shall at all times observe all of the requirements of the laws of the State of Florida in the matter of segregation of the races, etc." There is no showing that there would be segregation of any negro admitted to the University of Florida under the Board's resolution. Petitioners do not point out what may be the laws of the State of Florida applicable to such students who may be admitted to the University. The reason they do not mention it is that *there are no segregation laws of Florida applicable* to any negro students who may be admitted to the University of Florida under the Board of Control's resolution or otherwise.

The court has said that the importance of a question may affect the granting or denial of a petition for certiorari. The rights of citizens or groups of citizens are always important, but when any of such rights have been settled by repeated decisions of this court and over a long period of time, such as the "separate but equal" principle, the question ceases to have that *importance* which will require the attention of the court. The "separate but equal" principle is quite clear, and there is nothing unsettled about it. No reason has been presented to require a reconsideration of the long established doctrine. True, the question is persistent, and by what appears to be a calculated and continuous flow of cases, perhaps in the hope of wearing down the court.

It is admitted that petitioners would be within their rights in using that strategy, but it does not require appeasement.

By a line of decisions of this court dating back to the case of Hall v. DeCuir, 95 U. S. 485, 24 L. ed. 547, which was decided in *1887*, this court has announced, approved and confirmed the principle of "separate but equal" facilities. The Hall v. DeCuir case involved the question of the right of negroes to remain in cabins on steamboats reserved for whites and this court said that a statute requiring those engaged in transportation of passengers to separate white and colored passengers in Louisiana was constitutional. In a concurring opinion, one of the justices pointed out that "substantial equality of right is the law of the state and the United States, *but equality does not mean identity. . . .*" He referred also to separation of the races in the schools, and said:

> "Equality of rights does not involve the necessity of educating white and colored persons in the same school anymore than it does of educating children of both sexes in the same school, or different grades of scholars must be kept in the same school."

Plessy v. Ferguson, 163 U. S. 537, 41 L. ed. 256, 16 S. Ct. 1138, was decided by this court in *1896*. It involved a Louisiana statute which required separation of races by those furnishing transportation for passengers. Plessy, a negro, refused to occupy a place set aside for negroes. This court said:

> "Laws permitting or requiring separation of the races do not necessarily imply the inferiority of any race to the other and such laws have been generally recognized as valid exercises of the legislative police power."

The court gave as the most common instance of such laws, the establishment of separate schools for white and colored children. The court pointed out that this separation of the races in schools does not affect the political equality of the negro.

The court in that case further pointed out that in determining the question of reasonableness the State is at liberty to act as "the established usages, customs and traditions of the people" and with the view of "the promotion of their comfort and the preservation of peace and good order". The statute was upheld as valid.

Chesapeake & Ohio Ry. v. Kentucky, 179 U. S. 388, 45 L. ed 244, was decided in *1900*. This case considered the validity of a Kentucky statute requiring the railroad to provide separate accommodations for white and colored passengers. This court said there was no doubt about the constitutionality of the statute.

Chiles v. Chesapeake & Ohio Ry., 218 U. S. 71, 54 L ed. 936, was decided in *1910*. Here again this court upheld the Kentucky statute requiring separation of the races. In that case the court quoted with approval the language of Plessy v. Ferguson, supra, which upheld the legislative right to consider and follow "established usages, customs and traditions of the people and the promotion of their comfort and preservation of peace and good order."

McCabe v. A. T. & S. F. Ry. Co., 235 U. S. 151, 59 L. ed. 169, 35 S. Ct. 69, was decided in *1914*. This case involved the statute requiring separation of white and colored citizens on trains and in waiting rooms. This court approved the Circuit Court's holding:

> "That it had been decided by this court, so that the question could no longer be considered an open one, that it was not an infraction of the 14th amendment for a State to require separate, but equal, accommodations for the two races."

Gong Lum v. Rice, 275 U. S. 78, 72 L. ed. 172, 48 S. Ct. 91, was decided in *1927*. It involved the statute requiring the separation of white and colored students in schools. The statute was held valid. Mr. Chief Justice Taft said:

> "The right and power of the state to regulate the method of providing for the education of its youth at public expense is clear. . . .
>
> "The question here is whether a Chinese citizen of the United States is denied equal protection of the laws when he is classed among the colored races and furnished facilities for education equal to that offered to all, whether white, brown, yellow, or black. Were this a new question, it would call for very full argument and consideration but we think that is the same question which has been many times decided to be within the constitutional power of the state legislature to settle without intervention of the federal courts under the Federal Constitution."

and further said:

> " 'The most common instance of this is connected with the establishment of separate schools for white and colored children, which has been held to be a valid exercise of the legislative power even by courts of States where the political rights of the colored race have been longest and most earnestly enforced.' "

He added:

> "The decision is within the discretion of the state in regulating its public schools and does not conflict with the Fourteenth Amendment. The judgment of the Supreme Court of Mississippi is affirmed."

Missouri ex rel Gaines v. Canada, 305 U. S. 337, 83 L. ed. 208, 59 S. Ct. 232, was decided in *1938*. In that case Mr. Chief Justice Hughes said:

> "In answering petitioner's contention that this discrimination constituted a denial of his constitutional right, the state court has fully recognized the obligation of the State to provide negroes with advantages for higher education substantially equal to the advantages afforded to white students. The State has sought to fulfill that obligation by furnishing equal facilities in separate schools, a method the validity of which has been sustained by our decisions. 305 U. S. at 344, 83 L. ed. at 211" (Citing cases)

> "Here, petitioner's right was a personal one. It was as an individual that he was entitled to the equal protection of the laws, and the State was bound to furnish him within its borders facilities for legal education substantially equal to those which the State there afforded for persons of the white race, whether or not other Negroes sought the same opportunity. 305 U. S. at 351, 83 L. ed. at 214."

> "The admissibility of laws separating the races in the enjoyment of privileges afforded by the State rests wholly upon the equality of the privileges which the laws give to the separated groups

within the State . . . . 305 U. S. at 349, 83 L. ed. at 213"

"We are of the opinion . . . . that petitioner was entitled to be admitted to the law school of the State University in the absence of other and proper provision for his legal training within the State. 305 U. S. at 352, 83 L. ed. at 215."

Again, in *1948*, in the cases of Sipuel v. Board of Regents, 332 U. S. 631, 92 L. ed. 247, 68 S. Ct. 299, and Fisher v. Hurst, 333 U. S. 147, 92 L. ed. 604, 68 S. Ct. 389, this court recognized the doctrine of "separate but equal" facilities and later in the case of Sweatt v. Painter, 339 U. S. 629, 94 L. ed. 1114, 70 S. Ct. 848, recognized the same doctrine.

It will be observed that in many cases and over a long period of time, this court has consistently found that separate facilities do not deprive a member of the negro race of equal protection of the laws or any other of his constitutional rights, provided the facilities are substantially equal to those supplied to members of the white race.

The doctrine contains the two elements, *separation* with *equality*.

To provide equal facilities in separate schools, in some cases it is easy and simple, in others, more difficult—but in every case it is possible.

The matter of *equality* of facilities is as feasible and practicable now as it was when Chief Justices Waite, Taft, Hughes, and their illustrious associates and predecessors, wrote those decisions from as far back as 1887.

The other element of the principle—separation of the races in the enjoyment of the facilities, likewise, is the same now as then.

Separateness is no more separate now than it was in Hall vs. DeCuir, Plessy vs. Ferguson, Gong Lum vs. Rice, Missouri ex rel Gaines vs. Canada, and the other cases, supra.

Conclusion

The same reasons which supported the many decisions of this court upholding the "separate but equal" principle are as valid today as when announced in the cited decisions. The combination of equality with separation which this court's long line of decisions approved means exactly the same thing now as then,—which is to say that the decisions are as right today as when written. This court will not overturn a principle so fixed and fundamental as the "separate but equal" doctrine in the absence of an overpowering reason. Petitioners have shown no acceptable reason for the revolutionary prayer of their petitions.

Citing the decisions of this court, the Supreme Court of Florida in its first opinion (Hawkins R. 33), said: "No court in the land has ever required of a sovereign state any more than is encompassed within the plan proposed by the Board of Control in its answer. Every individual political right and privilege guaranteed the citizen by the provisions of the Federal Constitution is maintained under the program, while at the same time the right of the State to adopt such method as it finds best designed to afford substantially equal educational

opportunities to Florida citizens of different race groups has been preserved."

The petition should be denied.

Respectfully submitted,

RICHARD W. ERVIN
Attorney General

FRANK J. HEINTZ
Assistant Attorney General

RALPH M. MCLANE
Assistant Attorney General

HOWARD S. BAILEY
Assistant Attorney General

COUNSEL FOR RESPONDENTS